DOCKET FILE COPY ORIGINAL

RECEIVED

JAN 27 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
	)	
Rate Regulation	)	

COMMENTS OF
CENTER FOR MEDIA EDUCATION
ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS
NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS
NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE

Of Counsel:

Monica Fuertes
Nadja S. Sodos
Carl Settlemyer
Law Students
Georgetown University
Law Center

Andrew Jay Schwartzman
Gigi Sohn
Media Access Project

Angela J. Campbell
Sharon L. Webber
Citizens Communications Center
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535

Counsel for CME et al.

No. of Copies rec'd 0+5
List ABCDE

January 27, 1993

SUMMARY

The 1984 Cable Act established leased access channels so that consumers would have access to diverse sources of programming and programmers would have an outlet for their programming. Because cable operators were permitted to set rates, terms and conditions, and the process for resolving disputes was cumbersome, access channels were rarely used. Congress adopted the 1992 Cable Act to remedy this problem by directing the FCC to establish maximum reasonable rates and reasonable terms and conditions for leased access and to adopt procedures for dispute resolution.

CME suggests that none of the three methods of determining maximum reasonable rates proposed in the NPRM would fulfill Congressional intent to promote diversity and competition. The benchmark and cost-of-service approaches presume a uniform rate. A uniform rate would undermine diversity. As noted in the 1984 House Report, rates should vary depending upon the type of service being provided by the lessee. The marketplace approach is inconsistent with Congressional intent because a competitive market for leased access does not presently exist.

Thus, CME proposes a variable rate scheme with different rate categories for different types of program services. CME suggests separate rate categories for maxi-pay services; pay-per view services; a la carte or mini pay services; advertiser-supported networks; home shopping services; non-profit services; and part-time channel leasing. CME bases its proposals on

publicly available data that is admittedly incomplete. This data shows that each type of programmer has different financial arrangements, needs, and abilities to compete, all of which should be taken into account when establishing maximum reasonable rates. Consideration should also be given to the fact that leased access channels will provide the cable operator with additional programming which will attract subscribers. CME proposes initial rate maximums for each category, further proposing that if leased access channels remain unused two years after the implementation of such regulations, the Commission should lower those rates. This rate reduction provision is designed to ensure that congressional purposes are fulfilled and to give cable operators an incentive to make leased access work.

CME is particularly concerned that non-profit entities have access to cable. Thus, it urges the Commission to establish maximum reasonable rates for non-profit entities lower than that for other entities, regardless of whether the Commission adopts a variable rate scheme for leased access. Lower rates for non-profit entities would fulfill congressional intent, would not harm cable operators, and would be appropriate, even under a cost-based system. CME also proposes that a certain percentage of access channels be reserved temporarily for non-profit use.

CME argues that the 1992 Cable Act requires cable systems to offer billing and collection services to leased access programmers and further requires the Commission to establish reasonable rates, terms and conditions. Cable operators are the only entities that have the necessary information to bill subscribers and collect revenues.

CME urges the Commission to adopt reporting procedures to permit it to determine whether leased access is being utilized as intended. It is insufficient to rely solely on the complaint process.

CME suggests that the Commission adopt four ground rules to ensure that the terms and conditions for leased access are reasonable. First, channel lessees must be provided access on equivalent terms to the access provided to the lessees' competitors on a given cable system. Second, lessees should be provided with access on a first-come, first-served basis to make sure that the cable operator cannot choose which lessees to carry based on content or favoritism. Third, leases must be granted for an appropriate period of time to assure the viability of the channel. Fourth, leased access channels must be carried on the lowest tier possible so they are available to as many subscribers as possible.

CME also proposes that the Commission bar migration of existing services to leased access channels. Otherwise, operator-approved incumbents would migrate and neither competition or diversity would be increased.

Finally, CME generally supports the NPRM's dispute resolution proposal. However, CME suggests that in all cases where the FCC is unable to resolve a dispute within 30 days, the lessee should be allowed on the channel under its proposed rates (perhaps putting the difference in escrow), and to the extent possible, its proposed terms and conditions. This procedure gives the cable operators an incentive to negotiate and makes the programming available to the public sooner.

TABLE OF CONTENTS

RECEIVED

JAN 27 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
	)	
Rate Regulation	)	

Comments

The Center for Media Education, the Association of Independent Video and Filmmakers, the National Association of Artists' Organizations, and the National Alliance for Media Arts and Culture (hereinafter collectively referred to as "CME")[1] hereby submit comments in response to the Notice of Proposed Rulemaking in the above referenced proceeding, FCC 92-544, released December 24,

[1] CME is a non-profit public interest policy and research organization dedicated to promoting the democratic potential of the electronic media. CME's goal of developing and promoting public interest media policies includes establishing competition and diversity in cable programming.

The Association of Independent Video and Filmmakers is a 5000 member national organization that provides information and advocacy services to the field of independent media producers. Its members have an interest in leasing access on cable systems.

The National Association of Artists' Organizations is a nonprofit membership organization serving over 300 organizations and 350 individuals. It is dedicated to serving and promoting artist-run organizations across the country. The NAAO membership represents thousands of individual working artists in rural and urban communities across the United States -- underserved artists, organizations, and communities who would benefit from favorable FCC regulations for the nonprofit sector.

The National Alliance for Media Arts and Culture is an association of 190 nonprofit media arts organizations. NAMAC's goals include making independent media accessible to the general public and ensuring that telecommunications outlets make room for independent voices.

1992, concerning rate regulation in the cable industry.[2] Specifically, CME submits comments on the proposals regarding leased commercial access. CME urges the Federal Communications Commission ("Commission") to implement rules that will ensure that a wide range of programmers, particularly non-profit programmers, are able to utilize leased access channels.

I. Maximum Reasonable Rates

The history of leased access from 1984 to date illustrates how effective the cable industry has been in discouraging leased access. Because operators were able to utilize unleased channels,[3] and because the mechanisms for defeating unreasonable pricing were unworkable, cable operators were able to block the intent of Congress for nearly a decade without detriment to themselves.

Congress mandated a different scheme in the 1992 Act. As CME recommends in its comments below, the Commission needs to establish a structure by which leased access is readily obtained. CME agrees with the Commission's tentative conclusion that "maximum reasonable rates for leased commercial access will apply to all cable systems." NPRM at ¶ 146. It is important that the Commission establish reasonable maximum rates based on the nature of the programming and the type of revenue, if any, it generates. If operators' revenues are proportional to those of the lessees, CME

---

[2] Implementation of Sections of the Cable Television Consumer Protection Act of 1992, Rate Regulation, Notice of Proposed Rulemaking, FCC 92-544 (rel. December 24, 1992), 58 Fed. Reg. 48 ("NPRM").

[3] See 1984 Cable Act § 612(b)(4), 47 U.S.C. § 532 (b)(4).

believes the chances that operators will work with lessees rather than against them will be greatly enhanced. Such a symbiosis would do more than an army of Commission regulators to eliminate conflict over unreasonable conduct on the part of cable operators -- and, as a corollary, reduce the demand on the Commission's resources to settle disputes.

A. The Commission's Alternatives for Setting Maximum Reasonable Rates for Leased Access Are Not Workable and Do Not Satisfy Congressional Intent

The Commission proposes three alternatives for determining maximum reasonable rates for leased commercial access: 1) a benchmark rate based on the costs of a typical or ideal cable system, 2) a rate based on the cost of providing the service, and 3) a rate based on the market for leased commercial access. NPRM at ¶¶ 146-154. Unfortunately, none of the three satisfy congressional intent. In addition, we seriously question the workability of each proposal.

1. A Uniform Benchmark Rate is not Appropriate

With the benchmark alternative, the Commission proposes to set the maximum reasonable rate for leased access based on typical costs for constructing and operating channel capacity. NPRM at ¶ 148. The implication of this proposal is that the maximum rate would be the same for every cable system and every program lessee. This result would clearly contradict congressional intent that the cable operators charge different rates to different types of programmers.

The 1984 House Report explicitly states that Section 612 permits cable operators to establish discriminatory rates:

> [N]othing in these provisions is intended to impose a requirement on a cable operator that he make available on a non-discriminatory basis channel capacity set aside for commercial use by non-affiliated persons. Non-discriminatory access requirements could well undermine diversity goals .... A cable operator who would have to provide access to all programmers at the same price would inevitably be forced to set an average price which was lower than the fair market price for certain uses of the cable system by certain sources, while being much higher than the fair market price for other services. Thus, by establishing one rate for all leased access users, a price might be set which would render it impossible for certain classes of services, such as those offered by not-for-profit entities, to have any reasonable expectation of obtaining leased access to a cable system.
>
> It is therefore appropriate for the cable operator in establishing reasonable price, terms and conditions pursuant to this section to do so on the basis of the nature of cable service being provided. A premium movie service will obviously warrant a very different and, in all probability, a higher price than a news or public affairs service, and both of these would pose a different pricing situation from an educational or instructional service ....[4]

In the 1992 Cable Act, Congress amended Section 612 to require the FCC to establish "maximum reasonable rates" because it found that the existing leased access provisions did not work well.[5] Finding that "the cable operator is almost certain to have interests that clash with that of the programmer seeking to used leased access channels," it concluded that it made little sense to

---

[4] H.R. Rep. No. 934, 98th Cong., 2d Sess. 51 (1984) ("1984 House Report") (emphasis added).

[5] S. Rep. No. 138, 102d Cong., 1st Sess. 32 (1991) ("1991 Senate Report").

permit the operator to establish the access rates.[6] By requiring the FCC to establish maximum reasonable rates for access, billing and collection and establishing reasonable terms and conditions, Congress reasoned that "programmers will know the parameters of an agreement, increasing certainty and the use of these channels."[7]

Nothing in the 1992 Act or its legislative history suggests that the FCC must establish a single maximum reasonable rate, or contradicts the language quoted above from the 1984 House Report. Indeed, the statute authorizes the FCC to "determine the maximum reasonable rates that a cable operator may establish ...."[8] The Senate Report observes that "the FCC is given broad discretion" in establishing such rates.[9] Were the Commission to establish a single uniform maximum reasonable rate, it would defeat the key congressional goal of diversity for the very reasons stated in the 1984 House Report. Because of their lesser ability to pay for access, non-profit entities, minority programmers and educational programmers would be particularly disadvantaged by adoption of a single benchmark. Yet, it is these types of programmers that Congress specifically sought to encourage.[10]

---

[6] Id. at 31.

[7] Id. at 32.

[8] 1992 Cable Act § 612 (c)(4)(A)(i), 47 U.S.C. § 532 (c)(4)(A)(i).

[9] 1991 Senate Report at 79.

[10] See 1984 House Report at 51; 1992 Cable Act § 612(i), 47 U.S.C. § 532(i).

Another problem with uniform, cost-based benchmarks is determining what costs should be taken into account. In a universe in which the cable operator either pays to carry most stations or is required by law to carry many stations, it would be impossible for the operator to isolate the costs of carriage of the lessee. The cable operator would have an incentive to place a larger than fair percentage of total those costs on the lessee.

2. A Cost-of-Service Based Rate is not Appropriate

With the cost-of-service alternative, the Commission proposes that rates for leased access would be "designed to recover the costs of providing those services." NPRM at ¶ 149. CME opposes this method of setting maximum reasonable rates for the same reasons it opposes the benchmark approach: it goes against congressional intent of establishing different rates depending upon the nature of the programming.

Additionally, the Commission found that a cost-of-service approach for determining subscriber rates would increase administrative burdens and would be contrary to congressional intent.[11] NPRM at ¶ 57. The Commission further questioned the usefulness of a cost-of-service approach because:

> cost-of-service regulation gives regulated companies little incentive to be more efficient, to improve service, or otherwise to make regulated service more attractive to consumers. Cost-of-service regulation also imposes high costs on the regulators and regulatees. It forces companies to devote substantial resources to participating in the regulatory process, burdening them with accounting and reporting requirements....cost-of-service accounting may require a significant (and

[11] See 1992 Cable Act § 623(b)(2)(A), 47 U.S.C. § 543(b)(2)(A).

potential expensive) departure from current industry accounting practices.
NPRM at ¶ 58.

If such burdens exist with cost of service subscriber rates, they would certainly exist with cost of service leased access rates.

3. Marketplace Rates Would not be Appropriate

With this alternative, the Commission proposes not to regulate the rates of leased access assuming that a competitive marketplace for leased access exists. NPRM at ¶ 152. CME urges the Commission not to adopt this proposal. Rates based on a competitive marketplace cannot exist where there is no competitive marketplace. Congress has already determined that there is no competitive marketplace for leased access.[12] Congress has required the Commission to set maximum reasonable rates for leased access specifically because no competitive market exists.[13] Thus, the Commission cannot rely on the marketplace to set maximum reasonable rates.

B. The Commission Should Establish Different Rate Maximums Depending Upon the Type of Service

Because uniform, cost-based pricing has a detrimental effect on the diversity of program sources -- especially non-profit lessees -- the Commission should set reasonable maximum rates for various categories of use. Below, CME proposes that the Commission

---

[12] 1991 Senate Report at 29-32. See 137 CONG. Rec. 583 (1991) (statement of Sen. Danforth) ("[T]he right of access has been used infrequently and the goal [of an electronic soapbox] has not been met, because the cable operator can set any price he wants for the leased channel.")

[13] 1991 Senate Report at 32.

establish separate rate categories for maxi-pay services (such as Home Box Office and Showtime); pay-per view services; a la carte or mini-pay services; advertiser-supported networks (such as Cable News Network or ESPN); home shopping services; non-profit services; and part-time channel leasing. We also propose reasonable maximum rates based on publicly available data. We acknowledge that this data is incomplete and our proposals will need to be revised when more complete information is obtained. We strongly urge the Commission to collect and make public the data necessary to establish reasonable maximum rates and to eliminate cable operators' monopsony profits.

1. Maxi-Pay Services

Maxi-pay services are full-time networks which are purchased individually by the consumer. They typically retail at about $10 per month. The most popular of such services, such as Showtime and Home Box Office, can attain a penetration of 50% or more of basic subscribers on a given cable system.

The cable operator purchases maxi-pay programming from the supplier at a wholesale price, which is set according to a formula and which is generally not publicly disclosed. Nevertheless, it appears that large cable operators today usually retain more than half of the retail price for a maxi-pay network. The network and cable operator collaborate on the promotion and marketing of pay services. The cable operator is responsible for billing and collection. The operator also bears the cost for local signal security. This is comparatively simple in addressable cable systems, since the signal is scrambled, and addressable converters can be instructed to descramble it with a few computer keystrokes. But security is cumbersome in non-addressable systems, since physical traps have to be installed at each location to insure that the pay service is blocked to those who do not subscribe to it.

Assuming a $10 retail price for a maxi-pay service, a $4 wholesale price, and 25% penetration of basic subscribers, the cable operator has a gross margin of $1.50 per basic subscriber per month.[14]

CME recommends that the Commission establish maximum lease rates for maxi-pay purposes according to a revenue split between the cable operator and programmer, much as is now accomplished in the industry. However, CME recommends that initial maximum rates be set with a 40-60 revenue split, in favor of the programmer, for leases executed in 1993 and 1994. If leased access channels are still unused by the end of 1994, the Commission should presume that the "reasonable maximum" was set too high and reduce it to a 30-70 revenue split in favor of the programmer.[15]

This structure has two advantages. The fact that operators share maxi-pay revenues will give them an incentive to help to

---

[14] Net revenue for carriage of the maxi-pay will be less, with the precise amount determined by how much the operator spends for marketing, promotion, billing collection and other costs.

[15] Under this proposal, billing and collection services would be provided by the operator at an extra charge, if desired by the programmer. Marketing and promotion support would not be included within this revenue split either. A more favorable split for the programmer may be justified in an addressable system where the operator has little incremental cost of signal security.

promote and sell such services, thereby increasing the chances that maxi-pays can succeed via leased access. Second, the fact that the revenue split will grow less favorable over time gives operators the incentive to conclude leases expeditiously and to make such arrangements succeed -- a marked contrast to the pattern established from 1984 to the present.

If a maxi-pay service on leased access is priced at $10 and it achieves a penetration of 10% of basic subscribers, revenue to the cable operator will equal $0.40 per subscriber per month -- probably considerably more than it could charge under a uniform cost-of-service based standard.

2. Pay-Per-View

There are two major pay-per-view (PPV) program types: events (such as musical performances or sporting events) and movies. Like maxi-pay services, cable operators purchase pay-per-view programming at wholesale prices and resell it at a mark-up. Wholesale PPV prices are typically 50% of retail prices. Some PPV events retail for significant amounts: $35 or so for a single championship boxing event, for example. Movies typically retail for $3 to $5 each. Marketing, promotion, billing, and collection arrangements are similar to those entailed in maxi-pay services.

Event PPV does not require a full-time channel, since the programming is sporadic. Full-time PPV movie channels are available to cable operators. It is also possible for operators to "self book" movies on an individual basis, which are usually assembled by the operator to run on its own full-time channel(s).

PPV penetrations vary widely according to: the popularity of movies and events, whether a cable system is able to accept last-minute "impulse" orders, the extent of marketing, and other factors. In systems featuring "impulse" ordering, the monthly movie buy rate can exceed the number of basic subscribers (producing a "buy rate" of over 100%).

PPV is practical only in homes served with an addressable cable converter. To date, less than half of all cable subscribers have such a converter.[16] Paul Kagan Associates estimated that through mid-1991 PPV revenue totalled approximately $2.00 monthly for each addressable basic cable home. It estimated that as of mid-1992, that amount would rise to approximately $3.00.[17]

CME believes that once again, the Commission should set maximum channel rental rates in the form of a revenue split between programmer and operator. We recommend that the initial split be 40-60 in favor of the programmer for leases executed in 1993 and 1994, and 30-70 thereafter if unleased access channels remain.[18]

If PPV achieves significant penetrations, revenue to the cable operator will be substantial. For example, a 50% movie buy rate at $4 per movie would produce revenue to the cable operator of $0.80 per subscriber monthly with a 40-60 revenue split---considerably higher than would be achieved for a single channel through a cost-

---

[16] The Kagan Media Index, August 21, 1991 at 6.

[17] Id.

[18] These figures would exclude payment to the cable operator for billing and collection, as well as payment for marketing and promotion support.

based uniform pricing structure. A 5% buy rate of a $35 boxing match would produce $0.70 per subscriber for a couple of hours of air time.

3. A La Carte and Mini-Pay Services

A la carte and mini-pay services have become the buzzwords of recent cable conferences in light of the anticipated expansion of channel capacity, and coming regulation of basic service rates. The concept is that channels would be retailed at relatively low rates--perhaps as little as $0.50 each month--either individually or in packages at a discount. Subscribers might be able to construct their own tiers of channels from a menu of selections.

However, there is very little practical industry experience with mini-pay or a la carte options. Encore, a movie channel, is often retailed for as little as $1 monthly, but is also often bundled with maxi-pays as a means of discouraging subscribers from dropping the higher-priced services. These practices probably indicate that Encore cannot be used to predict the performance of mini-pays or a la carte channels in general.

It would appear that channel lessees cannot be assured that their low-priced program offerings will be bundled with others as part of a larger a la carte package plan; this could prove a fatal disadvantage vis-a-vis mini-pay competitors for whom cable operators make available channel capacity on a non-leased basis with the intent to group them into packages.

Because retail prices are lower, and because of the lessee's anticipated disadvantage with respect to competitors which do not lease channels, CME recommends that the Commission establish a more favorable revenue split with respect to mini-pay leased access programmers:[19] 25%-75% in favor of the programmer for leases executed in 1993 or 1994, and 20%-80% thereafter if access channels remain unleased. Assuming a $2 monthly retail price and 10% penetration, gross revenue to the programmer would be $.15 per basic subscriber monthly and $.05 to the cable operator.

This level of revenue is probably enough to support a programmer if it is able to obtain cable carriage on a national basis and generate substantial advertising sales as well (a perhaps dubious prospect in light of this prospective service's limited penetration). The cable operator's share of the revenue split may be less than it would receive if the channel were leased on a uniform, cost-of-service basis, but its exposure is limited given the unproven viability of a la carte services and the inherent disadvantage of channel lessees regarding inclusion in packages.

4. Advertiser-Supported Networks

Current major advertiser-supported networks (such as the Cable News Network, ESPN, the USA Network, and others) earn dual income streams. They are paid a certain number of cents per subscriber per month by the cable operator for their programming, and they receive income from national advertising.[20] The amount cable

---

[19] CME recommends that services which retail for $4.00 or less monthly be defined as mini-pays.

[20] Ad-supported networks generally offer the cable operator advertising time ("avails") which the operator can sell on a local basis.

operators pay for basic networks varies widely, with the more prominent networks generally obtaining higher payments. Generally, these figures are proprietary.

It is clear, however, that cable operator mark-ups for basic cable are much higher than they are for other categories of programming. Paul Kagan Associates estimated that combined fees paid for all basic cable networks carried averaged $1.70 per subscriber per month as of July 1991, and projected them to rise to $1.90 per subscriber per month as of July, 1992.[21] Basic cable subscribers now pay about $20 monthly for their service, although that amount covers local broadcast signals and superstations as well as advertiser-supported program networks. While this bundling means that one cannot isolate the mark-up on basic channels, clearly it is immense--at least several hundred percent.

There is little reason to believe that advertiser-supported cable networks could survive if they had to pay for cable channel carriage; if such were the case, at a minimum, they regularly would offer their programming to cable operators at no charge.[22] Since

---

[21] The Kagan Media Index, August 21, 1991 at 6. Costs for basic networks will vary considerably among cable systems, principally according to the number of such networks included in the basic tier and the price discounts obtained by the cable operator. In recent years, basic network costs have increased substantially, but not sufficiently to alter the fundamental fact that basic is by far the most lucrative service offered by operators.

[22] Superstations like WTBS and WGN are profitable without deriving direct payments from cable operators. However, they can amortize their costs in part through local advertising revenues from their communities of license. In no instance do they pay for carriage.

free carriage for commercial enterprises cannot be justified under the rubric of Section 612(c)(1), and since even such favorable treatment would probably be insufficient to assure their viability, it may be futile for the Commission to set a reasonable maximum rate for advertiser-supported leased access channels. Probably the best it can do is to establish a revenue split, similar to that for mini-pay,[23] but even more favorable to the programmer. The Commission should monitor whether for advertising supported program services are purchasing leased access, and if not, alter the percentage of the split.

---

[23] In theory, advertiser-supported networks are little distinguished from mini-pays: the operator pays a wholesale rate and resells the channel (in common with others) at a mark-up. This analysis, however, fails to take into account the power of the basic tier's requirement that subscribers buy a full line-up of channels--many of which he or she does not watch. CME is aware of no evidence that prominent advertiser-supported networks like CNN or ESPN could survive on an a la carte basis. Newer, weaker networks--those most likely to appear on leased access--are more dependent upon bundling into a basic line-up than such leading networks.

Without bundling, as the number of homes accepting a channel falls, the retail rate that remaining subscribers must pay to maintain the programmer's revenue rises, perhaps to prohibitive levels. These economic facts bode very poorly for the feasibility of launching advertiser-supported networks on leased access channels.

There is a long-term prospect that in a 500 channel system, a single entity could lease 50 channels or more to offer a competing basic service by licensing program networks at wholesale prices and reselling them to subscribers at an attractive package price. While such an approach would both offer important public interest benefits and raise interesting questions under the Cable Act, CME submits that such a possibility is not yet ripe for consideration by the Commission.

5. Home Shopping Services

Home shopping services are typically 24-hour channels. In exchange for carriage, they pay cable systems a commission on the sales they make within zip code areas served by such systems.

Paul Kagan Associates estimated that home shopping sales per home reached averaged $2.40 monthly in mid-1991, and projected that they would rise to $2.60 monthly in the next year.[24] In interpreting these figures, one must keep in mind that some homes receiving a home shopping service do so only through broadcast television,[25] and that certain cable subscribers have access to multiple shopping services.

It is expected that QVC Networks will soon surpass $1 billion in annual sales.[26] Unlike the Home Shopping Network, QVC has no broadcast distribution. Assuming $83 million in monthly sales and 50 million cable homes, QVC's sales per home exceeds $1.50 per basic subscriber per month.

CME strongly disapproves of over-the-air broadcast stations which are predominately devoted to home shopping programming. However, if a home shopping service which does not utilize broadcast spectrum wishes to lease a channel, CME recommends that the maximum lease rate for home shopping networks be set at 15% of

---

[24] *The Kagan Media Index*, August 21, 1991, p. 6.

[25] This is one of the few instances in which the cable operator monopsony appears to be limited with respect to a programming service.

[26] Calvin Sims, Diller Acquires QVC Stake, N.Y. Times, Dec. 11, 1992, at D1.

gross sales in the zip code areas served by the cable system. This would amount to roughly $0.22 per subscriber per month for a network which sells as much as QVC, and which probably would exceed the amount a cable operator would derive under a uniform cost-of-service method of rate-setting.

6. Non-Profit Services[27]

Of various existing non-profit, program suppliers, CME is not aware of any that currently pays for signal carriage. Public television stations are often carried by cable, but they neither pay for carriage nor receive payment (even under the recently enacted retransmission-consent provisions of the Cable Act). Non-profit networks such as C-SPAN are paid a per-subscriber fee by cable operators. Some local public, educational, and governmental channels are supported by cable operators; often, they receive a portion of franchise fees.

Given that advertiser-supported networks as formidable as ESPN and CNN could probably not survive if they were forced to pay for access to cable channels, it is extremely unlikely that non-profit services will be able to survive if they are required to pay appreciable amounts to gain carriage. Accordingly, CME recommends that the Commission establish a maximum rate of 0.1 cent per subscriber per month for a non-profit channel; or 3% of such channel's gross revenues derived from carriage, whichever is

---

[27] Although Section 612 of the Cable Act is titled "Cable Channels for Commercial Use," Subsection 612(b)(5)(B) states that "the term 'commercial use' means the provision of video programming, whether or not for profit." 1992 Cable Act § 612(b)(5)(B), 47 U.S.C. § 532(b)(5)(B).

greater.[28] These sums are almost certain to be less than those which would be charged under a uniform cost-of-service standard. However, for the reasons discussed below, CME believes this preferential rate to be justified.[29]

In light of current industry conditions, CME believes that it has recommended the highest rate under which non-profit entities would be able to operate on leased access channels. The alternative -- higher rates -- would in effect bar a whole classification of service that Congress intended to be provided through Section 612.

7. Temporary Reservation of Leased Access Channels for Non-Profit Use

To further implement congressional intent that non-profit programmers be able to lease cable channels, CME recommends the temporary reservation of a portion of leased access channels for non-profit use. CME believes that cable operators should provide leased access channels on a first-come, first-served basis.[30] However, as the Commission has learned with respect to non-commercial, educational broadcast frequencies, it generally takes longer for educational entities to raise the funds needed to launch a new service. Accordingly, CME urges the Commission to require a

---

[28] Even these rates may be beyond the means of community-based non-profit organizations with limited budgets. Thus, the Commission could consider establishing a nominal flat rate for such organizations.

[29] <u>See</u> <u>infra</u> at § I(C).

[30] <u>See</u> <u>infra</u> at II(A).